

March 21, 2011

Via Electronic Mail

Robert R. Scott, Director
Air Resources Division
State of New Hampshire
Department of Environmental Services
P.O. Box 95
29 Hazen Drive
Concord, New Hampshire 03302-0095

Re: Comments on DES's Preliminary Determination of Baseline Mercury Input

Dear Mr. Scott:

Conservation Law Foundation ("CLF") appreciates the opportunity to provide these comments on the New Hampshire Department of Environmental Services' ("DES" or the "Department") Preliminary Determination of Baseline Mercury Input dated February 2011 (hereinafter, the "Preliminary Determination").

CLF supports the approach used by the Department in determining the baseline mercury input and baseline mercury emissions and provide the following comments:

DES Properly Determined the Baseline Mercury Input as Required by RSA 125-O:11-18

The Preliminary Determination was rendered pursuant to RSA 125-O:14 which provides a detailed scheme for determining the baseline mercury input and emissions by which to assess the reduction in mercury emissions required under the statute. The statute requires the baseline mercury input to be calculated by collecting a "representative sample of the coal used traditionally" for a 12 month period, which ran from August 2006 through July 2007. The statute provides guidance for determining the coal "used traditionally" through a parenthetical which states "not to include trial or test coal blends." RSA 125-O:14, I(a). Thus, those coals which are reasonably determined to be combusted as part of a trial or test during the 12 month period are not to be considered, and conversely, those coals which are not part of a trial or test, must be considered to determine baseline mercury input.

In its filings to DES, PSNH asserted an unreasonably broad interpretation of "trial or test coal blends" claiming that coals it has used for many years to achieve compliance with applicable air pollution control requirements, specifically Russian coal, Pocahontas coal, and Venezuelan coal were "trial or test blends" which should be excluded from the determination of baseline mercury input. In fact, the coals which PSNH seeks to exclude comprised 57% of the

coal tonnage used by Merrimack unit MK1 and 48% of the coal used by unit MK2 during the coal sampling period mandated by RSA 125-O:14,I(a). PSNH's position belies common sense and is not consistent with the statute. See, <http://www.merriam-webster.com/dictionary> (defining "trial" as "a tryout or experiment to test quality, value, or usefulness"; defining "test" as a critical examination, observation, or evaluation"). Clearly, PSNH's regular use of and reliance on such coals cannot be characterized as a trial or test.

The Department's Preliminary Determination correctly concludes that the Venezuelan and Pocahontas coals extensively used and relied upon by PSNH over many years and more importantly, during the coal sampling period, may not be excluded from the calculation of baseline mercury input under the statute as they cannot reasonably be considered "trial or test coal blends." Accordingly, the Department's determination of "the average mercury content of the fuel" used by PSNH at Merrimack Station properly included the Venezuelan and Pocahontas coals which PSNH sought to exclude.¹

CLF strongly supports the Department's Preliminary Determination. As the administrative agency charged with reviewing and approving the baseline mercury input and baseline mercury emissions, and the agency possessing the technical expertise, its conclusions are entitled to deference. See, *In re Town of Bethlehem*, 154 N.H. 314, 321 (2006) (conclusions DES draws based on its expertise and the evidence before it should be given great weight). See also *In re Town of Newington*, 149 N.H. 347, 350 (2003) (same).

CLF's comments are provided without prejudice to any and all legal claims, causes of action or rights with respect to the proper interpretation of RSA 125-O and PSNH's actions there under.

Thank you for the opportunity to comment.

Sincerely,



N. Jonathan Peress
Director, Clean Energy and Climate Change Program

¹ In this regard, CLF believes that the Department may have improperly excluded Russian coal as a "trial or test coal blend."